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# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 498

HENRY C. RIPLEY, APPELLANT,

vs.

THE UNITED STATES.

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No. 499

THE UNITED STATES, APPELLANT,

vs.

HENRY C. RIPLEY.

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APPEALS FROM THE COURT OF CLAIMS.

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FILED FEBRUARY 9, 1911.

(22,508 and 22,509.)



(22,508 and 22,509.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 887.

HENRY C. RIPLEY, APPELLANT,

vs.

THE UNITED STATES.

No. 888.

THE UNITED STATES, APPELLANT,

vs.

HENRY C. RIPLEY.

APPEALS FROM THE COURT OF CLAIMS.

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In the Court of Claims.

No. 28555.

HENRY C. RIPLEY

vs.

THE UNITED STATES.

*I. Petition and Amendments.*

Claimant on the 4th day of October 1905 filed his original petition.

On the 28th day of March 1907, the claimant filed his amended petition, which, on October 3, 1907, he further amended, by leave of Court, to stand as follows, to wit:

*Amended Petition.*

Petitioner, by leave of Court first had, files this his amended petition.

*I.*

Petitioner is a citizen of the United States and of the State of Michigan.

*II.*

In the act approved June 13, 1902, entitled "An act making appropriations for the construction, repair and preservation of public works on rivers and harbors and other purposes," the Congress of the United States made provision for certain improvements in the harbors of Galveston and Aransas Pass in the State of Texas (32 Statutes at Large, 340). As regards Aransas Pass the purpose of such appropriation was to continue the construction of a jetty of which the Aransas Pass Harbor Company, a private corporation, had previously constructed a part, the paragraph in said bill provided for that work being as follows:

Improvement Aransas Pass, Texas.—Continuing improvement, \$250,000: Provided that the work at this harbor shall be confined to the completion of the north jetty in accordance with the design and specifications of the Aransas Pass Harbor Company and in continuation of the work heretofore carried out on said jetty by said company and to such additional work as may be necessary for strengthening such jetty, and for the removal of such part of the old Government jetty and any other hard material which may interfere with the formation of a channel by the natural action of the current.

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*III.*

The plan of said jetty at Aransas Pass was radically different from any other designs that had been utilized in the United States in the

construction of jetties. One Lewis M. Haupt had obtained a patent for said plan. Theretofore efforts to obtain an exemplification of it through the appropriations of Congress had failed, and for such exemplification said patentee had given said Aransas Pass Harbor Company license to use it and during such use of it he was consulting engineer for said company. Such construction as had been accomplished by said company on said jetty was done under a contract let by it of which the specifications regarding the order of work, materials and method of construction were as follows:

Plan.—The cross-section will consist of a foundation of brush not to exceed two (2) feet covered with stone three (3) feet thick, and widths as follows: First two thousand feet forty (40) feet wide; next seventeen hundred feet, fifty (50) feet wide; and the next twenty-five hundred feet, sixty (60) feet wide. Or the brush work may be dispensed with wholly or in part at the discretion of the contractor. And a superstructure having a top width of ten (10) feet at an elevation of three (3) feet above the plane of mean low tide and with side slopes of one and one-half ( $1\frac{1}{2}$ ) horizontal to one (1) vertical. The superstructure will be formed of a core of riprap with a surface protection of a large block of stone.

Method of Construction.—The actual location of the work will be furnished to the contractor whenever needed by the engineer in charge by indicating the position for guide piles and ranges. Such piles and ranges to be furnished and placed by the contractor at his own cost. The foundation will first be constructed to its full width and thickness and be kept at least three hundred (300) feet in advance of the ends of the superstructure. The Sections F, A, B, C, D shall be laid first, the *working* beginning in fifteen (15) feet depth at "F" and extending landward as rapidly as possible, care being taken to deposit the stone evenly and continuously within the limits prescribed for the breakwater, the coarser materials being placed first and the finer materials or quarry refuse on the interior—unless the material comes unassorted so that it is impracticable to separate it. The material composing the core will be placed along the central line of the superstructure, and when of sufficient height

to permit it the sides will be protected by depositing large blocks of stone along either side, and when the core shall have been completed and the surface leveled off at the proper height and width the placing of the larger blocks will immediately follow; and these latter will be carefully placed with a derrick so as to cover the top and sides of the core completely. In placing the blocks care must be used to make the sides smooth and uniform and the interstices left above the water surface between the blocks after placing them as compactly as possible will be filled with riprap in pieces to suit the size of the voids.

Stone.—The stone must be of good quality, hard and compact and not susceptible of disintegration, and weighing not less than one hundred and thirty (130) pounds per cubic foot dry.

Riprap.—The riprap will vary in size from one hundred pound to one thousand pound pieces to the extent of from 70 per cent. to 75 per cent. of the whole amount. From 25 per cent. to 30 per cent.

will consist of smaller pieces such as the quarry will furnish, and may be denominated "quarry refuse," but it must be free from dirt or very fine stuff.

**Blocks.**—The blocks of stone for the protection of the exposed top and sides of the superstructure will vary in size from two to five tons, according to the degree of exposure to wave action. The quality of the blocks must be somewhat better than that of the rip-rap and must weigh not less than one hundred and thirty-five (135) pounds per cubic foot dry.

**Brush.**—Brushwork will be made into mattresses of approved design.

#### IV.

On October 10, 1902, Capt. C. S. Riche, of the Corps of Engineers, United States Army, who had charge of the improvements at Galveston and Aransas Pass, published an invitation for proposals for those continued improvements together with specifications, applicable in part to both of said improvements and in parts to the two improvements severally. Such of said specifications as concerned the order and method of the work at Aransas Pass, the materials for and inspection of the work and payment for extra work are as follows:

#### *General Conditions (Applicable to all the Jetty Work).*

\* \* \* \* \*

35. Unless extraordinary and unforeseeable conditions supervene, the time allowed in these specifications for the completion of the contract to be entered into is considered sufficient for such completion by a contractor having the necessary plant, capital and experience. If the work is not completed within the period stipulated in the contract, the Engineer Officer in charge may, with the prior sanction of the Chief of Engineers, waive the time limit and permit the contractor to finish the work within a reasonable period, to be determined by the said Engineer Officer in charge. Should the

original time limit be thus waived, all expenses for inspection and superintendence and other actual loss and damages to the

United States due to the delay beyond the time originally set for completion shall be determined by the said Engineer Officer in charge and deducted from any payments due or to become due the contractor: Provided, however, that the party of the first part may, with the prior sanction of the Chief of Engineers, waive for a reasonable period the time limit originally set for completion and remit the charges for expenses of superintendence and inspection for so much time as in the judgment of the said Engineer Officer in charge may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unforeseeable cause, of delay arising through no fault of the contractor, and which prevented him from commencing or completing the work or delivering the materials within the period required by the contract: Provided further, that nothing in these specifications shall affect the

power of the party of the first part to annul the contract as provided in the form of contract adopted and in use by the Engineer Department of the Army.

\* \* \* \* \*

35. Supervision.—The work shall be executed under the supervision of the Engineer Officer in charge and his duly authorized agents. The order of the work shall be subject to the approval of the Engineer Officer in charge, the alignment of the work shall be prescribed by him, and without his permission no work shall be conducted on Sundays and legal holidays. The contractor shall personally superintend the work during its process, or have it personally superintended by a competent and responsible representative duly accredited as such to this office. Any incompetent, insubordinate, disorderly or objectionable employee of the contractor shall be dismissed from the work if required by the Engineer Officer in charge and not reemployed. Such discharge shall not form the basis of any claim for compensation or damage upon the United States or any of its agents.

38. Inspection.—The United States will employ one or more inspectors on each work. The contractor, without additional compensation, shall, when required, furnish every facility for such inspectors, and for the Engineer Officer in charge and his agents, to supervise and inspect all work and materials, and to send and receive official mail. All transportation necessary for these purposes shall be promptly furnished by the contractor without expense to the United States. Wherever the contractor furnishes board and lodging to his own employees, he shall also, if required by the Engineer Officer in charge, furnish suitable board and lodging to such employees of the United States as are connected with the work, all at reasonable rates satisfactory to the Engineer Officer in charge, to be paid for by the United States with the monthly payments.

\* \* \* \* \*

5 40. Weighing.—All work will be paid by the ton of 2,000 pounds, as determined by the weights shown by a standard railway track scale. The weighing will be done by an agent of the United States, but the track scale and all facilities for adjusting and testing it shall be furnished by the contractor. It shall be located as close as practicable to the work or to the point where the rock is transferred from railway cars to barges, and all costs of weighing, other than the services of the agent of the United States, shall be borne by the contractor. Empty cars returned from the work shall be weighed whenever directed by the U. S. agent in charge. Any disagreement as to weights that may arise between the above mentioned agent and the contractor shall be communicated in writing by the contractor to the U. S. agent in charge, within forty-eight hours of the time at which the disputed weighing was done; otherwise the contractor's contention may be disregarded in preparing the estimates. Rock for which different unit prices are paid shall not be loaded on the same car. The cars shall be assorted and culled before weighing, and all rejections will be in carload lots.

After weighing, the cars shall, as soon as possible, be delivered to the work or be unloaded onto barges in readiness to be towed out and placed in the work; but any rock weighed and not subsequently delivered or placed in the work will be disregarded in preparing the estimates. Inspecting, measuring, and weighing of materials will be done only between the hours of 7 A. M. and 4 P. M., unless other hours should be specifically authorized by the Engineer Officer in charge. If required by said officer, the contractor shall provide displacement wells on each and every barge, with floats and measuring rods, all in accordance with plans which will be furnished him; this for a check to determine whether or not the correct amount of material has been delivered on the work.

\* \* \* \* \*

41. Placing.—Where the contract contemplates the placing of the materials in the work, all materials shall be placed carefully and securely where directed by the U. S. agent in charge. No material dropped overboard, unloaded, or placed otherwise than where directed by said agent will be included in the estimates. Except with the special permission of the Engineer Officer in charge, the placing of all materials in the works shall be done only during good daylight, which is understood to mean when no light 6 in the lantern of the nearest U. S. lighthouse can be seen at the work.

42. Extras and Charges.—If, at any time it should, in the opinion of the Engineer Officer in charge, become necessary to do any work or to make any purchase not herein specified, for the proper completion of this contract, the contractor shall furnish the same at the current rates existing at the time of said purchases or work; said current rates to be determined by the Engineer Officer in charge, and payment therefor to be made with the monthly payments. But changes that involve no material increase in cost shall be made by the contractor, without additional compensation, whenever directed by the Engineer Officer in charge. Such boats, labor, and material (other than surveying instruments and special apparatus) as may be required from time to time to aid the employees of the United States in inspecting, in making surveys, or in other matters connected with the work, shall be furnished for the time by the contractor at cost price (as determined by the Engineer Officer in charge, exclusive of contractor's charges for supervision, superintendence, etc.) whenever required by the United States agent in charge, and will be paid for by the United States with the monthly payments, except where the contractor is herein specifically required to furnish such services, etc., at his own expense.

\* \* \* \* \*

*Special Conditions (Applicable to Arkansas Pass Jetty).*

\* \* \* \* \*

60. Materials.—The materials used in the work will be small riprap, large riprap, and large blocks. Riprap shall be sandstone, limestone, granite, or other rock satisfactory to the Engineer Officer in

charge. It shall be of good durable quality, compact, hard, tough and sound. Sandstone must not weigh less than 125 pounds, limestone not less than 140 pounds, and granite not less than 160 pounds per solid cubic foot. Small riprap shall be in pieces weighing from 10 pounds to two tons, but not over 25 per cent. by weight shall be "one man stone." Large riprap shall be in pieces of not less than two tons in weight, and the average weight shall not be less than two tons. Large blocks shall be granite or other rock, weighing not less than 160 pounds per solid cubic foot. It shall be of good durable quality hard, tough, sound, clean, of compact texture, free from loose seams and other defects. Blocks shall be as closely rectangular in form as practicable, and varying not over 6 inches from the dimensions  $3\frac{1}{2}$  feet by 5 feet by 8 feet. Their bed surfaces shall be a nearly plane as practicable.

61. Placing.—The materials shall be placed in the work by the contractor in such manner as to bring the jetty to its full cross-section, as shown by drawings on file at this office. Its crest shall be about 4 feet in elevation, 10 to 15 feet wide, with side slopes of about 1 vertical to  $1\frac{1}{2}$  horizontal. Pieces of large riprap for the visible portion of the jetty will be selected by the U. S. agent in charge as the large riprap arrives at the work, and, when required by said agent, these selected pieces shall be stored on the work at the expense of the contractor until such time as, in the judgment of said agent, they can advantageously and properly be placed. Between stations 27 and 40 the contractor shall place such small quantity of small and large riprap as may be required by the U. S. agent in charge. From Station 40 to the vicinity of Station 55 voids in the old work will be filled and the jetty reinforced with large riprap, only such limited amount of small riprap being used as the U. S. agent in charge may designate. Such replacing of the rock now in the jetty as may be necessary to give a reasonably smooth appearance to the completed work shall be done by the contractor without additional compensation. Between Stations 20 and 27 and from the vicinity of Station 55 seawards the method of construction shall be as follows: A mound of small riprap shall first be built up over and around the existing structure to about one foot elevation. When in the judgment of the U. S. agent in charge this mound has become sufficiently consolidated, its gaps and interstices shall be filled and its crest levelled with small riprap, generally one man stone. Large blocks shall then be bedded in crest of mound in two rows breaking joints with their longest dimensions parallel to the axis of jetty in such manner that voids under the placed blocks will be at a minimum, and side slopes and remainder of crest shall then be covered with large riprap. When completed, the jetty shall present at least as smooth and even a surface to the waves and as finished appearance as the portion between Stations 27 and 40, which was constructed under a prior contract. Where the uncompleted structure is liable to serious damages from waves, as small a length of the jetty as practicable shall be under construction at any one time.

## V.

Petitioner desired to bid on the contract so advertised by Capt. Riche, but upon examination of the advertised specifications by himself and said Lewis M. Haupt they made objection that the same varied substantially from the plan and specifications under which said prior work had been done. Their objection being communicated to the Chief of Engineers of the Army he, upon the recommendation of the Board of Engineers having general supervision of river and harbor and improvements, directed that this variance be corrected by the preparation of new specifications. Said Capt. Riche then corresponded with petitioner and said Lewis M. Haupt regarding the changes necessary to be made in the specifications and suggested that, in order to save time, he should merely add amendments instead of preparing entirely new specifications, and he forwarded to said Lewis M. Haupt certain contemplated amendments and invited an expression of his views thereupon. In reply, and at petitioner's request, said Lewis M. Haupt wrote a letter in which he

suggested only such modifications of said amendments as he deemed to be indispensable for the conforming of the proposed work to said original design and specifications. Said Capt. Riche made the changes so suggested in his amendments and then, to wit, on November 9, 1902, published the amendments as an additional notice to bidders, those amendments being as follows:

Referring to advertisement, instructions, specifications, proposals, etc., for the construction and repair of the jetties at Galveston Entrance, Brazos River and Aransas Pass, dated October 10, 1902, the attention of contractors is invited to the following special conditions relating to the work to be done at Aransas Pass, Texas. It is the intention to commence the placing of stone at the outer end of the present partially completed work at the point "F" on map of Aransas Pass, published in the Annual Report of the Chief of Engineers for 1900, and build towards the shore to the extent of available funds, and paragraphs 35, 59 and 63, relating to inspection, proposed work and time, in-so-far as they relate to Aransas Pass, are hereby amended to read as follows:

Inspection.—The United States will employ one or more inspectors on the work, and the Aransas Pass Harbor Company may also have an inspector on the work to represent its interests and see that the work is done to its satisfaction. But this latter inspector shall have no power to give orders to the contractor but will submit any communication that he may make to the Engineer Officer in charge or his agent. The contractor, without additional compensation, shall, when required, furnish every facility for such inspectors and for the Engineer Officer in charge and his agents, to supervise and inspect all work and materials, and to send and receive official mail. All transportation necessary for these purposes shall be promptly furnished by the contractor without expense to the United States. Wherever the contractor furnishes board and lodging to his own employees, he shall also, if required by the Engineer Officer in charge, furnish suitable board and lodging to such employees of the

United States as are connected with the work, all at reasonable rates satisfactory to the Engineer Officer in charge, to be paid for by the United States with the monthly payments.

**Proposed Work.**—The amount of money available for the purpose of this contract is about \$200,000. The intent of this contract is to complete North Jetty to its full cross section from its outer end inwards as far as available funds will permit. It is the intention to do all of this work under the same contract.

**Time.**—The placing of rock in the jetty shall begin within 90 calendar days from the date of receipt by the contractor of his copy of the contract duly approved. The work shall thereafter be prosecuted vigorously and continuously with a suitable plant to insure its completion on or before January 31, 1904. Failure to begin placing rock on time, or failure to earn 25 per cent. of the total amount of the contract, as derived from the approximate quantities, prior to June 30, 1903, or failure to complete the work on time, will give the United States the right to annul the contract, according to the provisions in the form of contract adopted and in use by the Engineer Department of the Army.

Paragraph 61, Placing, is also modified so as to make the crest of the completed structure about three feet in elevation instead of about four feet above mean low water, and ten feet wide instead of ten to fifteen feet wide.

Bidders are especially cautioned to note that the times named in paragraph 63 of the printed specifications are materially modified by the substitute paragraph herein.

C. S. RICHE,  
*Captain, Corps of Engineers.*

## VI.

Petitioner on March 11, 1903, submitted to said Captain Riche, at his said office, a proposal on the Aransas Pass jetty work, and at the same time presented to him a letter, of which a copy follows:

GALVESTON, TEXAS, *March 11, 1903.*

Captain C. S. Riche, Corps of Engineers, U. S. A., Galveston, Texas.

**CAPTAIN:** The proposal herewith for the Aransas Pass jetty work is made with the understanding that the amount of money available for this work is \$200,000, and that the amount of the bond required will be 20 per cent. of this, or \$40,000, and that I will furnish a surety company bond.

I will also agree to furnish at four dollars and fifty cents (\$4.50) per ton in place such proportional part of the large riprap as can be had, in the process of quarrying the small riprap of sandstone or limestone. It is believed that a very considerable percentage of the large riprap can thus be secured.

This proposal is also submitted with the understanding that, on account of the delay in letting this work beyond the time anticipated in the advertisement from December to March, the time for

earning 25 per cent. of the amount of the contract will be correspondingly extended.

In view of the increased freight rates over former rates, the increased cost of labor and material, and the necessity of building a new wharf for the transfer of stone from cars to barge, the prices herewith submitted must be regarded as very reasonable.

Very respectfully,

H. C. RIPLEY.

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## VII.

Said bid of petitioner was accepted by said Captain Riche, and on the 6th day of April, 1903, he and petitioner entered into a contract in writing relating to said jetty work, in the words and figures following, the said Captain Riche, in awarding and signing said contract, acting for the United States; which contract was on April 20, 1903, approved in writing by said Chief of Engineers:

1. This Agreement entered into this sixth (6) day of April, nineteen hundred and three, between Captain C. S. Riche, Corps of Engineers, United States Army, of the first part, and Henry Clay Ripley, of Ann Arbor, in the county of Washtenaw, State of Michigan, of the second part, witnesseth, that in conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said Captain C. S. Riche, Corps of Engineers, United States Army, for and in behalf of the United States of America, and the said Henry Clay Ripley, do covenant and agree, to and with each other, as follows:

That the party of the second part, in accordance with the advertisement and specifications for jetties, dated October 10, 1902, and of the notice to bidders, dated November 29, 1902, amending said specifications, and of the letter accompanying the proposal of the party of the second part, dated March 11, 1903, all of which are hereunto attached, and in so far as they relate to this contract, are made a part of it, shall furnish for Aransas Pass jetty 31,480 tons, more or less, small riprap, of which not to exceed 25 per cent. by weight will be one man stone, properly placed in the work; 21,000 tons, more or less, large riprap, properly placed in the work; 2,510 tons, more or less, large blocks, properly placed in the work, which shall be paid for by the party of the first part at the following prices, to-wit: Small riprap, of which not to exceed 25 per cent. by weight will be one man stone, properly placed in the work, three and 75-100 dollars (\$3 75-100) per ton; large riprap (granite), properly placed in the work, four and 60-100 dollars (\$4 60-100) per ton; and large riprap, obtained in the quarrying of small riprap, properly placed in the work, four and 25-100 dollars (\$4 25-100) per ton; large blocks, properly placed in the work, five and 10-100 dollars (\$5 10-100) per ton.

The party of the first part extends the time limit for earning 25 per cent. of the total amount of the contract, as derived from the approximate quantities, as stated in paragraph 63 of the specifications, dated October 10, 1902, and as amended by notice to bidders,

dated Nov. 29, 1902, from prior to June 30, 1903, to prior to September 30, 1903.

11 2. All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as does not conform to the specifications set forth in this contract shall be rejected. The decision of the Engineer Officer in charge as to quality and quantity shall be final.

3. The said party of the second part shall commence, prosecute, and complete the work herein contracted for as set forth in paragraph 63 of the attached specifications, dated October 10, 1902, as amended by notice to bidders, dated November 29, 1902, and as herein further amended.

4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money or reserved percentage due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise, in accordance with law.

5. It is further agreed that if the party of the second part shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the party of the first part may, with the prior sanction of the Chief of Engineers, in lieu of annulling the contract under the preceding paragraph, waive the time limit and permit the party of the second part to finish the work within a reasonable period, to be determined by the said party of the first part. Should the original time limit be thus waived, all expenses for inspection and superintendence, and all other actual losses

12 and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said party of the first part and deducted from any payments due or to become due the party of the second part: Provided, however, that the party of the first part may, with the prior sanction of the Chief of Engineers, remit the charges for expenses of inspection and superintendence for so much time as in the judgment of the said party of the first part may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the party of the second part, and which actually prevented him (or them) from commencing or completing the work or delivering the materials within the period required by the contract, but such waiver of the time and remission of charges shall in no other manner affect the rights or obligations of the parties under this contract.

6. If, at any time during the prosecution of the work it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

7. No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

8. The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

9. It is further agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all  
13 of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

10. The party of the second part further agrees to hold and save the United States harmless from and against all and every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article or process included in the materials hereby agreed to be furnished and work to be done under this contract.

11. Payments shall be made to the said party of the second part as prescribed in paragraph 34 of the specifications hereto attached and forming part of this agreement.

12. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferer or the transferee, but all rights of action for any breach of this contract by said Henry Clay Ripley are reserved to the United States.

13. No member of, or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom.

14. This contract shall be subject to approval of the Chief of Engineers, U. S. A.

Petitioner furnished the materials and performed the work so contracted for on the Aransas Pass jetty, and, except as is herein-after recited, he has received the compensation due him from the United States for the same.

### VIII.

In said previous work done on said jetty the only requirement regarding the cap blocks was that they should weigh not less than one hundred and thirty-five (135) pounds per cubic foot out of the water, should be roughly rectangular in form, and should be merely of sufficient size to give stability to the structure; no precise dimensions were ever required with reference to any stones of sufficient size. In the course of that work it was ascertained that granite blocks of the weight of one hundred and sixty (160) pounds per cubic foot above water and of mean dimensions of three (3) feet by four and one-half ( $4\frac{1}{2}$ ) feet by seven and one-half ( $7\frac{1}{2}$ ) feet were sufficiently heavy; and the only purpose of said Captain Riche, said Lewis M. Haupt and petitioner, in the preparation of said specifications under which petitioner contracted to continue the work, and of said Captain Riche and petitioner, in signing the contract, was to exclude from use as cap blocks all stones less in size than said mean dimensions or considerably larger in mean dimensions than

14 four (4) feet by five and one-half ( $5\frac{1}{2}$ ) feet by eight and one-half ( $8\frac{1}{2}$ ) feet, or not substantially of rectangular shape.

It was also understood between petitioner and said Captain Riche that said stones were to be obtained in the usual way of quarrying and rending granite, including the use of wedges, which cause such stone to break on natural lines of cleavage in which there are necessarily some irregularities; those conditions having been discussed in detail by petitioner and said Captain Riche before they entered into

said contract; and it was under tool between them that the stones to be offered by petitioner should be tested, not by extreme but by mean measurements, so that stones generally acceptable and answering the said ascertained need of the work should not be rejected merely because at certain sections they should vary something more than six (6) inches from the dimensions of three and one-half ( $3\frac{1}{2}$ ) feet by five (5) feet by eight (8) feet, or should not be exactly rectangular. All the stones provided by petitioner for this use were quarried in said usual way and were approximately rectangular and did not in mean dimensions vary more than six (6) inches from said last named measurements and were as serviceable and valuable for that use as if of those precise dimensions and strictly rectangular. But before petitioner's work was commenced under said contract said Captain Riche had been succeeded as Engineer Officer in charge by Captain Edgar Jadwin, and when the delivery of the cap blocks at the work began said Captain Jadwin and his subordinates charged with the inspection of the stones applied extreme tests to them, rejecting, as a rule, all that varied at any sections as much as six (6) inches from said measurements last named, or in which there was any noticeable variation from rectangularity. Petitioner made protest to said Captain Jadwin against said method of testing the stones, and thereafter, for a time, the exactions of said subordinates regarding the dimensions and shape of the stones were not so rigid, but subsequently the use of said extreme tests was renewed and petitioner again made protest to said Captain Jadwin against that construction of the contract, and said Captain Jadwin then suggested and prepared a supplementary agreement which was signed by him and petitioner and was approved by the Chief of Engineers and the Secretary of War, the text of that agreement being as below:

Whereas, on the 6th day of April, 1903, a contract was entered into between Captain C. S. Riche, Corps of Engineers, United States Army, for and in behalf of the United States of America, of the first part, and Henry Clay Ripley, of Ann Harbor, in the county of Washtenaw, State of Michigan, of the second part, for Aransas Pass jetty, said contract having been approved April 20, 1903, by the Chief of Engineers, United States Army.

15       Whereas, paragraph 60 of the specifications provides as follows:

60. Materials.—The materials used in the work will be small riprap, large riprap, and large blocks.

Riprap shall be sandstone, limestone, granite, or other rock satisfactory to the Engineer Officer in charge. It shall be of good durable quality, compact, hard, tough and sound. Sandstone must not weigh less than 125 pounds, limestone not less than 140 pounds, and granite not less than 160 pounds per solid cubic foot. Small riprap shall be in pieces weighing from 10 pounds to two tons, but not over 25 per cent. by weight shall be "one man stone." Large riprap shall be in pieces not less than two tons in weight, and the average weight shall not be less than 4 tons.

Large blocks shall be granite or other rock weighing not less than 160 pounds per solid cubic foot. It shall be of good, durable quality,

hard, tough, sound, clean, of compact texture, free from loose seams and other defects. Blocks shall be as closely rectangular in form as practicable, and varying not over 6 inches from the dimensions of  $3\frac{1}{2}$  feet by 5 feet by 8 feet. Their bed surfaces shall be as nearly plane as practicable.

Whereas, it has been found advantageous to all parties concerned to modify said contract so far as it relates to said paragraph 60 of the specifications attached to said contract.

Now, therefore, it is mutually agreed between Captain Edgar Jadwin, Corps of Engineers, United States Army, for and in behalf of the United States of America, and the said Henry Clay Ripley, for himself, executors, and administrators, that the said paragraph 60 of the specifications attached to said contract be modified to read as follows:

Paragraph 60. Materials.—The materials used in the work will be small riprap, large riprap, and large blocks.

Riprap shall be sand-stone, lime-stone, granite, or other rock satisfactory to the Engineer Officer in charge. It shall be of good, durable quality, compact, hard, tough, and sound. Sandstone must not weigh less than 125 pounds, limestone not less than 140 pounds, and granite not less than 160 pounds per solid cubic foot. Small riprap shall be in pieces weighing from ten pounds to two tons, but not over 25 per cent, by weight shall be "one man stone." Large riprap shall be in pieces of not less than two tons in weight, and the average weight shall not be less than 4 tons.

16 Large blocks shall be granite or other rock weighing not less than 160 pounds per solid cubic foot. It shall be of good durable quality, hard, tough, sound, clean, of compact texture, free from loose seams, and other defects. Blocks shall be as closely rectangular in form as practicable, and varying not over 6 inches from the dimensions  $3\frac{1}{2}$  feet by 5 feet by 8 feet. Their bed surfaces shall be as nearly plane as practicable, but any large block will be accepted that is as valuable or more valuable to the United States and will make the work as stable or more stable than if the dimensions conformed strictly to the letter of the specifications, and in consideration of the above change the contractor agrees to accept \$5.00 per ton for all blocks received under this agreement which would have been rejected under the original specifications.

This agreement shall not be operative until approved by the Secretary of War.

Except as herein modified, the original contract entered into on the 6th day of April, 1903, shall remain in force.

Although said supplemental agreement purported to be a modification of said original contract between petitioner and the United States, it did not in fact change that contract in any respect; it was merely a fuller and clearer expression, as regards the cap blocks, of what was intended to be written into said original specifications and contract. Through said rejection of the cap blocks so provided and the necessity of providing others the completion of the work by petitioner was delayed ten days, and its cost increased five thousand dol-

lars (\$5,000). The large blocks so rejected were used as large riprap and petitioner so paid for them at the lower price fixed in the contract for stone of that character. The difference between petitioner's compensation thus received for them and the sum he would have received if they had been accepted and used as cap blocks was forty dollars (\$40.00).

### IX.

The purpose of said paragraph 61 of the specifications governing said contract between petitioner and the United States, in prescribing that the jetty should be built up steadily to its full cross-section, was that in the performance of the work petitioner's craft, appliances, and employees, operating on the *lea* side of the structure, should be protected from the action of rough seas and delay of the work thus prevented. Said Captain Jadwin and his said subordinates, however, forbade and prevented the performance of the work in this order, requiring petitioner to build up for a long distance merely the core of the structure, with large riprap on the sides, and not permitting

17 him to place the cap blocks. The work was done in this order from about August 20, 1903, to May 1, 1904. Through the lack of the large blocks on the top of the core the structure was left so low that the waves continually passed over it and greatly interfered with and delayed the work of petitioner's employees and plant on the inner side. If it had been permitted, the cap blocks could have been laid over the entire length of the crest by the 1st day of November, 1903, and thus the said interruption to and delay of the work during the six months following after that day would have been prevented, and petitioner would have been able to work in each month ten days or more in addition to the time he was actually able to and did work. In said specifications relating to the contract taken by petitioner, and in the contract itself, no distance was named over which the foundation of the structure should be laid before any cap blocks should be imposed, because over a large part of the line of the structure the foundation, composed of brush mattresses and riprap, had been laid under said contract let by the Aransas Pass Harbor Company, and the same was compact and in good condition to receive the superstructure. On the portion of the line where no foundation had previously been laid, and where petitioner therefore placed the foundation materials, said Captain Jadwin and the subordinate officers in charge forbade and restrained petitioner from imposing the cap blocks until long after the foundation, in their judgment and, in fact, had become sufficiently consolidated and they had caused the crest to be levelled.

### X.

During the delivery and placing by petitioner of the stone on the jetty said Captain Jadwin and his said subordinates many times unlawfully interfered with and delayed said work, and thereby increased the cost of the same to petitioner.

## XI.

On one occasion when petitioner already had at the jetty a very small supply of stone the engine of a barge already loaded with stone such as was then needed for the work was broken, and petitioner undertook to expedite the carriage of this material by transferring the stone to another barge with an engine in good order, but said inspector at the jetty forbade and prevented this and required petitioner to transport and he did transport the stone on said crippled barge by other power and at much greater cost than would have attached to the proposed transfer and use of another barge; which action of said Captain Riche was entirely unwarranted and unlawful.

## XII.

Petitioner's material for said work was loaded on his barges at the town of Rockport, Texas, fifteen miles from the bar where said work was in progress, and was unloaded at the bar, where it was needed.

When it was not feasible to discharge from one of the barges  
18 the entire load of stone during the ordinary working hours, said Captain Jadwin and the inspecting officer at the jetty forbade and prevented the return of the barge to, and its reloading at, Rockport except on the condition that a permit therefor should be obtained in each instance from said inspector; and in order to obtain such permits it was necessary to stop petitioner's tows, drawing the barges, and send ashore to the office of said inspector, which was two miles from the bar. The delay thus caused increased considerably the expense of transportation of the material.

## XIII.

The purpose of the provision of paragraph 41 of said specifications that all materials should be placed carefully and securely where directed by the United States agent in charge as the same was understood by petitioner and said Captain Riche when said contract was executed, was that an inspecting agent of the United States should be constantly present during the placing of the stone; but the only agent of the United States who remained at the site of the work was a mere assistant to the inspector in said office, who disclaimed and would not exercise authority regarding this placing of the stone, and petitioner, therefore, whenever there could be any doubt of the proper placing of the stone, was compelled to and did send a boat ashore and bring the inspector to the work. This unlawful requirement considerably delayed the performance of the work and increased the cost of the same.

## XIV.

By said unlawful acts of said Captain of Engineers and his subordination, recited in the foregoing paragraphs IX, X, XI, XII and XIII, delaying petitioner's performance of said work undertaken by him, the cost to him of doing the same was increased thirty-two thousand and six hundred dollars (\$32,600).

## XV.

In the matter of large riprap selected for the visible portion of the jetty, the purpose of Paragraph 61 of said specifications, as understood by claimant and said Captain Riche when they entered into said contract, was merely that pieces of such stone already selected for the work by the agent of the United States in charge, if accumulated faster than needed, should be stored on the work and that the contractor should bear all expense incident to the double handling of the same. It was not intended that the contractor should bear the risk of the loss of any such selected pieces occurring before there should be *be* occasion to use them, but any loss of the same occurring after such selection, through no fault of his or of his employees, was to be borne by the United States. When occasion first arose to store such selected blocks on the completed portion of the work, said inspecting agent of the United States notified the petitioner that for any of such stones as should fall into the

19 water and be lost he would receive no pay. At times petitioner assembled considerable numbers of such selected stones, for which there was no immediate need, and, to protect himself against such loss through accidental submergence of these in the water, he was compelled to remove, and did remove them on his barges to a yard at Rockport, to store them there and load them on railroad cars and deliver them again at the site of the work when they were needed. By said method of handling the selected stones the cost of the work to petitioner was increased one thousand and one hundred and sixty-five dollars (\$1,165)

## XVI.

At several places when petitioner had completed the mound of said jetty and it was ready for the crest blocks and the selected riprap and the form of the crest had been approved by the United States inspecting agent in charge, said agent required petitioner to remove and he did remove the stone so placed and so reduced the height of the crest, which added work cost him the sum of fifteen hundred dollars (\$1,500). There was nothing in the specifications or contract which obliged petitioner to remove this material without compensation, and there was never any agreement or understanding between him and said Captain Riche or other agent of the United States that he should remove the same and not be paid therefor; the only provision applying to this work being paragraph 42 of the specifications, in which it was stipulated that any work not specified, necessary for the completion of the contract, should be done by the contractor, when called on by the Engineer Officer in charge, at current rates of compensation. Said sum of fifteen hundred dollars (\$1,500) is the aggregate of this item of the work, calculated in all respects at the rates paid by the petitioner at the time for other and similar work on the jetty and allowed to him in the payments made for such work.

## XVII.

Regarding the board and lodging of employees of the United States who should be engaged on or connected with said work, the purpose of the paragraph of the notice to bidders headed "inspection" and of the petitioner and said Captain Riche was that the United States should pay to petitioner therefor the same amounts that he was actually required to pay out at the same time for the board and lodging of his own employees with a reasonable amount in addition to cover such incidentals as should properly be chargeable to such board account. The actual cost to petitioner of the board of his own employees engaged upon said work, exclusive of all incidental expenses, was twenty dollars (\$20) per month for each person; but in the payments made to him by said Captain Jadwin he was allowed only fifteen dollars (\$15) per month for the board of each of the employees of the United States. At different stages of the

20 work petitioner was required by said engineer officers to furnish, and he did furnish, board and lodging to two of the employees of the United States for an average time of thirteen months; wherefore, at five dollars (\$5.00) per month for each of said persons, there was and is due to petitioner the sum of one hundred and thirty dollars (\$130) more than was allowed and paid to him.

## XVIII.

The purpose of Paragraph 42 of the specifications and of said Captain Riche and petitioner, regarding the rates to be allowed to petitioner for labor required to aid the employees of the United States in the various matters connected with the work, was that he should be paid for such labor at the rates of the actual cost to him of the labor employed by him on the jetty, not the mere current rates for laborers employed for a single day.

The rate paid by petitioner for an individual day's work to workmen thus casually employed was two dollars (\$2); but under his contracts with his workmen at large the cost to him of the labor, by reason of the interruptions of the work suffered through no fault of petitioner, was not less than six dollars (\$6) per day per capita. The extra labor which petitioner was required to furnish and did furnish was needed and furnished in smooth weather, when there was also need for his men upon the work specified in the contract, and when alone they could be so used, and, therefore, the cost to him of this extra labor was the said sum of six dollars (\$6) per day for each man; but said Captain Jadwin allowed and paid him only two dollars (\$2) per day for it. At the rate of four dollars (\$4) per day for each man, there was and is due to petitioner, above what was paid to him on account of such extra work, the sum of five hundred and sixty dollars (\$560).

## XIX.

In the matter of delays to the work and extension of time by reason of epidemics and quarantine restrictions the purpose of para-

graph 35 of the specifications and of petitioner and said Captain Riche, was (1) that the Engineer Officer in charge, not as mere matter of discretion, but as an obligation, should allow to petitioner an extension for the time of the continuance of such epidemic or quarantine restriction, and (2) that the time to be allowed should be that of the actual interruption of the work by the epidemic or consequent restrictions, not the mere period of the nominal restrictions of travel and trade established by law. While the

21 work was in progress there was an epidemic of yellow fever at San Antonio, Texas, petitioner's principal market for the supplies and labor required on said work, and at other points accessible from Aransas Pass; and, under quarantine restrictions imposed by the State of Texas and the cities affected, railroad trains to and from those cities were stopped for about two weeks. The period of the actual interruption of petitioner's work on said jetty resulting from the disorganization of his labor force and the delay of supplies was not less than one month; but said Captain Jadwin allowed to him for the completion of the work contracted for an extension of only fifteen days, relieving him of inspection charges for that time.

#### XX.

During petitioner's performance of the work so contracted for, a tug brought by him to Aransas Pass for use upon the same was run upon the bar by the pilot in charge and grounded; petitioner having employed said pilot to bring the boat into port because compelled thereto by the laws of the United States and the State of Texas. No act of petitioner or his proper employees caused or in any way contributed to said loss of his boat. The loss of said boat caused a delay of not less than one month; and, therefore, under paragraph 85 of the specifications, said Captain Jadwin was bound to extend the time for his completion of the work one month without charging him the expense of the inspection. No extension of time was in fact allowed petitioner, on account of the loss of said boat, for completing the work and he was not relieved of the expense of inspection for said length of time.

#### XXI.

Regarding the inspection of petitioner's said work by officers or agents of the United States and the cost to be paid for the same during any extension of time granted to petitioner, it was not the purpose of said paragraph 35 of the specifications, or of petitioner and said Captain Riche, that any excessive expense, disproportionate to that borne by the United States during the contract period, should be incurred by the United States during the period of such extension and imposed by it upon petitioner. During said contract period only two United States inspectors were employed upon said work. When the time for the completion of the work was extended the duties of the inspectors did not become more onerous and said two inspectors were still sufficient; but for the whole term of said extension a third officer was employed, partly in inspecting the work and partly in making maps, which should have been and could well

have been made, without interference with other work of the engineer in charge or the inspectors or other assistants, during the contract period, and in the payment made to petitioner upon the completion of the work the amount of the salary paid by the United States to said third officer, to wit, one hundred and twenty-five dollars (\$125.) was deducted and withheld, and it is still withheld from petitioner.

## XXII.

In the settlements made with petitioner for his said work he was charged with and deduction was made for the expenses of inspection of the work during the months of February, March, April, May, June, July and August and seventeen days in the month of September, 1904, including, besides the salary of said third officer referred to in Paragraph XXI hereinbefore, the salary and expenses, amounting to one hundred and thirty-one dollars and thirty-three cents (\$131.33), of one of the office assistants of said Captain Jadin during and for visits made by him to the work; the sum of three hundred and thirty-five dollars (\$335.00) being deducted for each month as the salaries of the two ordinary inspectors and the assistant engineer; none of which charges are included in the sums hereinbefore stated with respect to the increased cost of the work to petitioner. From the unforeseeable causes hereinbefore stated, arising through no fault of petitioner, his said operations were delayed for four months and three days, included in said period for which the inspection charges were imposed on him. Said visits of said office assistant to the work were not for the purpose of, and the duty performed by him at the work was not inspection or superintendence of the same, and the service there performed by him would have been necessary if the work had been completed by petitioner in the time fixed in the contract, and it was not occasioned by the extension of the time.

## XXIII.

Petitioner, during the performance of his said work, gave his own time and services thereto, constantly directing and superintending it. The reasonable value of his said services during said delay of four and one-tenths (4.1) months was eight hundred dollars (\$800) per month.

The premises considered, petitioner prays that the court, if it should deem this necessary, will reform said contract between petitioner and said Captain Riche, acting for the United States, so as to conform it with said specifications of the contract let by said Aransas Pass Harbor Company, with said alleged modification recited in paragraph VIII hereinbefore, and with the allegations of paragraphs IX, XIII, XV, XVII, XVIII, XIX and XXI, and that petitioner may have judgment against the United States in the sum of forty-five thousand nine hundred and thirty dollars (\$45,930); no part of his claim against the United States having been assigned and he being the sole owner of the same.

HENRY C. RIPLEY,  
By W. H. ROBESON,  
*His Attorney in Fact.*

## 23 DISTRICT OF COLUMBIA:

Before me, Martha M. Beck, a notary public in and for said District, W. H. Robeson, whose name is written as a part of the signature to the foregoing amendment to amended petition, being by me sworn, made oath that the allegations of said amendment are true to the best of his knowledge, information and belief.

W. H. ROBESON.

Subscribed and sworn to before me this 30th day of September, 1907.

MARTHA M. BECK,  
*Notary Public.*

24 II. *Traverse. Filed April 1, 1908.*

In the Court of Claims of the United States, December Term,  
A. D. 1910.

No. 28,555.

HENRY C. RIPLEY  
vs.  
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,  
*Assistant Attorney-General.*

25 III. *Final Re-argument and Re-submission of Case.*

On the 4th and 5th days of May, 1910, this case came on to be heard. Messrs. William H. Robeson and Benjamin Carter were heard in behalf of the claimant; Mr. Philip M. Ashford was heard in behalf of the defendants; Mr. F. Carter Pope replied and the case was submitted.

26 IV. *Findings of Fact and Conclusion of Law.* Filed June 9, 1910.

Court of Claims of the United States.

No. 28555.

HENRY C. RIPLEY  
v.  
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

*Findings of Fact.*

I.

The claimant herein is a citizen of the United States, of the State of Michigan.

II.

In the act approved June 13, 1902, entitled "An act making appropriations for the construction, repair, and preservation of public works on rivers and harbors, and for other purposes," the Congress of the United States made provision for certain improvements in the harbors of Galveston and Aransas Pass, in the State of Texas. (32 Stat. L., 340.) As regards Aransas Pass, the act provided:

"Improvement Aransas Pass, Texas: Continuing improvement \$250,000: Provided, That the work at this harbor shall be confined to the completion of the north jetty in accordance with the design and specifications of the Aransas Pass Harbor Company and in continuation of the work heretofore carried out on said jetty by said company and to such additional work as may be necessary for strengthening such jetty, and for the removal of such part of the old Government jetty and any other hard material which may interfere with the formation of a channel by the natural action of the current."

III.

On October 10, 1902, Captain C. S. Riche, of the Corps of Engineers, United States Army, who had charge of the improvements at Galveston and Aransas Pass, published an invitation for proposals for those continued improvements, together with specifications applicable in part to both of said improvements and in parts to the two improvements severally, which specifications are numbered 35, 37, 38, 40, 41 and 42, applicable to all jetty work, and 60 and 61 applicable to Aransas Pass jetty, and made a part of the amended petition herein under paragraph 4 thereof.

The first paragraph of the specifications relating to the Aransas

pass improvement, to wit, paragraph 58, consisted of the extract from the Act of June 13, 1902 set out in finding II and the following words:

"Nothing in the contract shall be interpreted as violating any of the requirements and provisions of the above extract."

#### IV.

Said specifications were sent to claimant, who had assisted in the preparation of same, and to Prof. Lewis M. Haupt, who had been consulting engineer of the Aransas Pass Harbor Company, and was the patentee of the plan on which the jetty was being erected at Aransas Pass.

Both claimant and said Lewis M. Haupt objected to some features of the specifications as published for the reason that they varied substantially from the plan and specifications under which the prior work had been done. Thereupon the Chief of Engineers requested Capt. Riche to withdraw the specifications and prepare new ones so as to fully agree with the original designs and specifications of the Aransas Pass Harbor Company and that the approval of said company should be received before reissuing the same. In order to save time it was agreed that the specifications should not be cancelled entirely but should be modified by amendments which would make them satisfactory to the Aransas Pass Harbor Company and to the claimant. Said modifications were embodied in an amendment which was published November 9, 1902. The amendments so prepared are set out in paragraph 5 of the amended petition. The parts of the specifications of said Aransas Pass

Harbor Company which relate to the plan of structure, the method of work and materials to be used are set forth in paragraph 3 of the amended petition.

#### V.

On March 11, 1903, claimant submitted to said Captain Riche at his office a proposal to do the Aransas Pass jetty work, accompanied by a letter as set forth in paragraph 6 of the amended petition. Said bid of claimant was accepted by Captain Riche and on April 6, 1903 the contract set forth in paragraph 7 of the amended petition was entered into. Said contract was approved by the Chief of Engineers April 20, 1903.

#### VI.

Claimant entered upon the performance of said contract on the 18th day of August 1903, and completed 2100 feet of the jetty from the outer end thereof shoreward, when operations under the contract ceased, about September 17, 1904, owing to the exhaustion of the appropriation therefor.

In the course of the work a dispute arose between claimant and the United States inspector in charge with reference to the acceptance and rejection of the stones designated in the specifications as crest blocks. Claimant contended that said specifications provided for mean measurement of the blocks, while the inspector adopted ex-

tre measurements and a large number of the blocks were rejected by said inspector as not conforming to the specifications. Many of those so rejected were afterwards accepted, but 90 of the stones offered as crest blocks were rejected as such and were accepted and used as riprap and paid for as such. The difference in the amount paid claimant for said stones used as rip-rap and the amount he would have received if they had been accepted as crest blocks was \$400. Claimant was compelled to furnish other crest blocks to take the place of those rejected which caused a delay of ten days to claimant in the completion of the work.

Claimant complained of the rejections of his crest blocks and in May 1904 he visited the engineer's office at Galveston and Captain Edgar Jadwin, who had succeeded Captain Riche as engineer in charge of the work, suggested that claimant write him a letter expressing his views on the subject which might be submitted to the Chief of Engineers at Washington with a view to a relaxation of the requirements as to crest blocks, whereupon claimant wrote the following letter:

ROCKPORT, TEXAS, *May 22, 1904.*

Captain Edgar Jadwin, Corps of Eng'rs, U. S. A., Galveston, Texas.

CAPTAIN: I have just returned from the quarry at Granite Mountain, where I have been to consult with Mr. Steinmetz, of the firm of J. M. O'Rourke & Co., in regard to the large granite blocks to be used in the construction of the jetty at Aransas Pass.

It is found to be very difficult, if not impossible, to get out these blocks of the exact dimensions required by the specifications without resorting to the use of stonecutters. I know that it was not contemplated that this should be done when the specifications were prepared, and it is believed that a slight variation from the exact dimensions given in the specifications will not in any way diminish the value of the block for the purpose for which it is to be used.

I would therefore respectfully request that you will accept any block that is as valuable or more valuable to the Government, and will make the work as stable or more stable than if the dimensions conformed strictly to the letter of the specifications.

Very respectfully,  
(Signed)

H. C. RIPLEY.

Thereafter a supplemental agreement to take the place of paragraph 60 of the specifications was entered into and signed by claimant and Capt. Jadwin and approved by the Secretary of War, becoming effective September 1, 1904, which agreement is set forth in paragraph 8 of the amended petition.

Two crest blocks of six offered after September 1, 1904 were rejected.

## VII.

In the performance of said work it was advantageous to claimant to have his employees operate on the lee side of the structure where they could be protected from the action of the rough seas, and for this purpose it was desirable that he be allowed

to impose the crest blocks on the top of the core as rapidly as possible so that the waves could not pass over it and interfere with the workmen, and thus prevent delay in the completion of the contract. The Aransas Pass Harbor Company had laid the foundation for the entire jetty and for 2800 feet, that is, between stations 27 and 55, the entire core of the structure had been built up, and between stations 27 and 40 the crest blocks had been laid. The foundation and the core thus previously constructed were fully consolidated when the contract with claimant was let.

When claimant had completed from 100 to 200 feet of the core he requested from the inspector in charge permission to begin to lay crest blocks which was refused on the ground that the core had not consolidated. By the end of December 1903 claimant had completed 400 to 500 feet of the core and again he requested permission to impose the crest blocks. Said inspector refused and continued to refuse permission to lay said crest blocks until May 1904 at which time between 1400 and 1500 feet of the core had been repaired and completed. Commencing in October 1903 when about 300 feet of the core had been built up to the required elevation, slope stones were laid on the jetty which afforded some protection from the action of the waves to the rip-rap already constructed, but not as much protection as the crest blocks would have afforded. When claimant was thus laying the slope stones, and throughout December 1903, and January, February, March and April, 1904, it was manifest that large parts of the work done by him had fully settled and consolidated. If claimant had been permitted to lay the crest blocks from that time on as the work progressed there would have resulted an additional protection which would have enabled him to work 60  
31 days more than he did between that time and May 7, 1904, date the first crest blocks were laid. When claimant was seeking permission to lay the crest blocks as aforesaid the inspector, in refusing same, alleged as a reason that the jetty had not had sufficient time to consolidate, and it does not appear that any other reason was at any time given by said inspector for so refusing.

### VIII.

During the progress of the construction of the jetty certain delays occurred in the unloading of claimant's barges, the placing of stone, and by the system of checking of the barges adopted by the Government to prevent loss at an early stage of the work. It does not appear that any of said delays or any increased cost to claimant thereby was through any fault or negligence on the part of the United States. On one occasion while claimant was unloading stone at the jetty, the hoisting engine of the barge from which the stone was being unloaded broke down and claimant was compelled to return to Rockport with said barge partially loaded. Claimant asked permission of the inspector to transfer the stone to another barge. Said inspector informed him that he did not feel authorized to grant such permission and suggested that claimant telephone to the assistant engineer at the work who had charge of keeping the accounts of the stone placed in the jetty for such permission. This claimant failed

to do and any delay caused by failure to transfer the stone was not the fault of the inspector or of the United States.

### IX.

Paragraph 61 of the specifications provides that the large pieces of rip-rap selected to be placed in open spaces in the jetty should be stored on the work at the expense of the contractor until such time as in the judgment of the United States officer they could be advantageously and properly placed. As said construction progressed

32 large pieces of rip-rap, selected for use at the sides of the crest blocks, were accumulated and claimant sought from the inspector permission to store these on the jetty until they should be needed. Said inspector informed him that the United States would not assume any risk of the loss of any of said pieces, and would not pay him for any of the same that, falling into the water, should take the place of rip-rap. Thereupon claimant returned considerable quantities of said pieces on his barges to Rockport, about 14 miles distant from the work, unloaded them in a railroad yard and afterwards, as the work was ready for them, loaded them on his barges and carried them a second time to the jetty. Claimant endeavored to have an inspector employed to select the stones at the quarry, offering to pay the expense of such inspection, but Captain Jadwin, engineer in charge of the work, would not consent to such an arrangement and required that the inspection and selection of the stones should not be made until they reached the jetty. Through such second handling of said pieces the completion of the work was delayed two days and claimant was compelled to pay and did pay for extra labor and the use of appliances at said railroad yard the sum of \$165.00.

### X.

In the construction of the core of the jetty it appeared that at different places pieces of rip-rap placed in the core at the direction and under the supervision of said inspector of the United States projected too far above the designated elevation to permit the laying of the crest blocks thereon, and claimant was required to remove the same so as to lower the jetty in order that said crest blocks might be properly placed, causing a delay in the completion of the work of three days. The removal of said rip-rap was necessary to the execution of the contract.

### XI.

As provided in the notice to bidders under the paragraph headed "Inspection," claimant furnished board to one of the Government's employees during the entire time the contract was under 32½ performance and to two others during a portion of the time.

For the board so furnished claimant was paid by the United States the sum of \$15 per month for each of said employees, amounting to \$261.50, which was the usual and customary price paid by the United States for the board and lodging of its employees at other points in Texas.

Claimant's actual outlay for the board of his employees was about \$20 per month.

## XII.

Paragraph 42 of the specifications provided that claimant should furnish, among other things, labor when required by the United States officer, for work not specified therein, for which the claimant was to be reimbursed by the United States at the cost thereof, to be determined by the engineer in charge.

From time to time claimant did furnish labor called for by the United States officer, which claimant was under contract to pay and did pay at average rates of \$60.00 per month. An aggregate of 140 days' labor was thus furnished. By reason of the interruptions to the work the actual cost to claimant of each man's labor was \$6 for each day of work.

The United States engineer officer in charge, in determining the cost price of said labor for the purpose of reimbursing the claimant, allowed and paid him \$2 per day for labor actually performed, which was the prevailing rate at that place for day labor.

## XIII.

During the progress of the work a further delay occurred by reason of an epidemic of yellow fever breaking out in the State of Texas, and quarantine was proclaimed and enforced at San Antonio for 15 days which prevented the operation of trains carrying stones for that time. Owing to these causes claimant's labor forces at the quarry became disorganized for said 15 days and for 15 days more and the completion of the work was in this way delayed for 30 days. The engineer in charge granted claimant an extension of 15 days on account of said quarantine during which time the  
33 charges for inspection and superintendence were remitted amounting to \$125.00.

## XIV.

At the commencement of the work a tug boat in claimant's employ under the pilotage of a regularly licensed pilot was grounded on a sand bar near the site of the jetty. The general progress of the work on said jetty was delayed 30 days by this accident. The amount charged for inspection and superintendence during such period of delay was about \$320 for which no allowance was made to claimant by the engineer. The grounding of said tug was not due to any fault, negligence, or misconduct of any officer or agent of the United States, nor was it due to any fault or negligence on the part of the claimant.

## XV.

In addition to an inspector of the stone at Rockport, there were at different times three others employed by the United States, part of whose time was charged to the claimant under paragraph 38 of the specifications, and whose services were necessary for the proper performance of the work under the terms of the contract.

## XVI.

In the settlements made with claimant for work done under said contract from month to month deductions amounting to \$2264.17 were made for the expense of inspection and superintendence of the work from February 15 to September 17, 1904. For no part of the period of extension allowed to claimant, except the 15 days for said quarantine, was he relieved of any part of said inspection charges. The average charge for inspection for the 7 months was \$323.45 per month.

In addition to said inspection charges there were deducted in the month of August 1904 the sum of \$72.50 on account of an additional officer, and \$83.33 salary and \$48 traveling expenses of assistant engineer Hartrick in connection with his visits to the site of the work and the quarry to investigate the complaint of  
34 claimant that the large blocks were being rejected improperly.

## XVII.

The total cost to claimant of performing the contract, exclusive of the cost of the granite and the cost of transport, and fitting up and repairs to barges, was \$63,780. The total number of days from the beginning to the completion of said work was 392, making an average daily cost to the contractor of \$162.70.

The work was completed on September 17, 1904. The number of days actual work performed was 131, of which 58 were subsequent to the 30th day of April, 1904.

## XVIII.

Claimant, under the requirements of paragraph 35 of the specifications, personally superintended said work the whole time. The value of his personal services in so doing was \$750 per month, but it does not appear that at this particular time he had any other enterprise under way or any other employment.

*Conclusion of Law.*

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant is entitled to recover judgment of and from the United States on findings VI, VII, XIII, XIV, XVI, XVII, and XVIII for the sum of Fourteen thousand seven hundred and thirty-two dollars and five cents (\$14,732.05). The petition as to the other items of the claim is dismissed.

BY THE COURT.

35     *V. Judgment of the Court. Entered June 9, 1910.*

No. 28555.

HENRY C. RIPLEY  
vs.  
THE UNITED STATES.

At a Court of Claims held in the City of Washington on the ninth day of June 1910, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the claimant and do order, adjudge and decree, that the claimant, Henry C. Ripley, do have and recover of and from the United States the sum of Fourteen thousand Seven Hundred and Thirty-two Dollars and five cents (\$14,732.05).

BY THE COURT.

36     *VI. Application for Appeal of Claimant.*

Comes the claimant by his attorney and moves the Court for an appeal to the Supreme Court of the United States from the judgment rendered herein by the Court on the ninth day of June, 1910.

Respectfully submitted,

W. H. ROBESON,  
*Attorney for Claimant.*

BENJAMIN CARTER,  
*Of Counsel.*

Filed August 30, 1910.

*VII. Application of Cross-appeal of Defendants.*

From the judgment rendered in the above-entitled cause on the 9th day of June, 1910, in favor of claimant, the defendants, by their Attorney General, on the 31th day of August, 1910, make application for, and give notice of, cross-appeal to the Supreme Court of the United States.

JOHN Q. THOMPSON,  
*Assistant Attorney-General.*  
P. M. A.

Filed August 31, 1910.

*Ordered.*

Ordered that the above appeal of the claimant and cross-appeal of the defendants, be allowed as prayed for.  
January 23, 1911.

BY THE COURT.

37 In the Court of Claims of the United States.

No. 28555.

HENRY C. RIPLEY  
vs.  
THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims, hereby certify that foregoing are true transcripts of pleadings in the above-entitled cause; of the findings of fact and conclusion of law filed by the Court; of the final judgment of the Court; of the application of the claimant for allowance of appeal to the Supreme Court of the United States, and of the application of the defendants for the allowance of a cross-appeal to said Supreme Court and of the order allowing said appeal.

In testimony whereof I have hereunto set my hand and the seal of said Court of Claims at the City of Washington this 26 day of January A. D. 1911.

[Seal Court of Claims.]

JOHN RANDOLPH,  
*Ass't Clerk Court of Claims.*

Endorsed on cover: File No. 22508. Court of Claims. Term No. 887. Henry C. Ripley, appellant, vs. The United States. File No. 22509. Term No. 888. The United States, appellant, vs. Henry C. Ripley. Filed February 9, 1911. File Nos. 22508 and 22509.

FILED.

MAR 9 1911

JAMES H. MCKENNEY,

CLERK.

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1910.

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HENRY C. RIPLEY, *Appellant*, }  
v. } No. **498**  
THE UNITED STATES, *Appellee*.

THE UNITED STATES, *Appellant*, }  
v. } No. **499**  
HENRY C. RIPLEY, *Appellee*.

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**On Appeal From the Court of Claims**

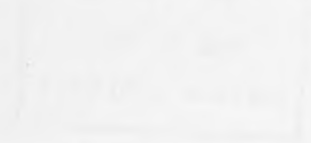
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**STATEMENT OF CASE, ASSIGNMENT OF ERRORS  
AND BRIEF FOR APPELLANT RIPLEY**

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WM. H. ROBESON,  
*Attorney for Appellant.*

BENJ. CARTER,  
F. CARTER POPE,  
*Of Counsel.*



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1910.

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HENRY C. RIPLEY, *Appellant*,  
v.  
THE UNITED STATES, *Appellee*. } No. 887.

THE UNITED STATES, *Appellant*,  
v.  
HENRY C. RIPLEY, *Appellee*. } No. 888.

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ON APPEAL FROM THE COURT OF CLAIMS.

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**STATEMENT OF THE CASE FOR CLAIMANT**

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This case is before this court on the appeal of the claimant from a judgment in his favor for \$14,732.05, rendered by the Court of Claims on June 9th, 1910. The claimant says that the conclusion of law is at variance with the findings of fact and that the judgment is inadequate.

The United States prosecutes a cross-appeal, and, as each party is both appellant and appellee before this court, we shall refer to them by their *nisi prius* designations.

This action grew out of alleged violations by the United States of its contract with the claimant for the construction of a section of the jetty at Aransas Pass, Texas. Construction on this jetty had previously been done by private

parties, as a private enterprise, on a novel design patented by Professor Lewis M. Haupt. The Government took over the improvement in 1902 under a clause of the rivers and harbors act, approved June 13th, 1902, (32 Stats. L. 340) appropriating \$250,000 for the continuation of the improvement, and providing that the work should be confined to the completion of the "north" jetty in accordance with the design and specifications of the Aransas Pass Harbor Company, which company was the last of the private concerns engaged in the construction of the jetty. Specifications were prepared and issued by the engineer department of the United States army as is usual in such work. They provided that "Nothing in the contract shall be interpreted as violating any of the requirements and provisions of the above extract"—an extract from the act of Congress to which we have referred and which is set out in full in Finding II.

The specifications first issued by the engineer department did not conform in every respect with those of the Aransas Pass Harbor Company, and, having been submitted to Professor Haupt, he made some suggestions and they were thereupon amended in some particulars which he deemed to be material. Under these amended specifications, claimant's bid was submitted in March, 1903, accepted in April, and a formal contract entered into.

The plan for the construction of the jetty provided first for the laying of a foundation of brush mattress weighted down by stone over the whole course of the jetty, then the building up of the jetty to a suitable height with small riprap, then the superimposition of heavy blocks of stone on this core (or "mound") and along its sides. The foundation for the entire jetty, however, had some time before been laid by the Aransas Pass Harbor Company and was ready for the claimant to work upon. The specifications

of the Aransas Pass Harbor Company did not provide that the crest blocks (or cap blocks) should be of any particular size, except that they should weigh from two to five tons, according to the degree of exposure to wave action. It was also stipulated that their quality should be somewhat better than that of the riprap and that they should not weigh less than 125 pounds per cubic foot dry. The specifications of the engineer department provided that the large blocks should be granite or other rock weighing not less than 160 pounds per cubic foot and that they should be as closely rectangular in form as practicable and vary not over six inches from the dimensions, three and one-half feet by five feet by eight feet, and that their bed surfaces should be as nearly plane as practicable. The specifications also provided that the large riprap (the side or slope stones) for the visible portions of the jetty should be selected by the United States agent in charge as it arrived at the work, and, when required by said agent, these selected pieces should be stored on the work at the expense of the contractor until such times as, in the judgment of said agent, they could advantageously and properly be placed; and for that section of the jetty on which (as it happens) all of claimant's work was done, they provided that the method of construction should be as follows:

"A mound of small riprap shall first be built up over and around the existing structure to about one foot elevation. When in the judgment of the U. S. agent in charge this mound has become sufficiently consolidated, its gaps and interstices shall be filled and its crest levelled with small riprap, generally 'one man stone.' Large blocks shall then be bedded in crest of mound in two rows breaking joints with their longest dimensions parallel to the axis of jetty in such manner that voids under the placed blocks will be at a minimum, and side slopes and remainder of crest shall then be

covered with large riprap. When completed, the jetty shall present at least as smooth and even a surface to the waves and as finished appearance as the portion between Stations 27 and 40, which was constructed under a prior contract. Where the uncompleted structure is liable to serious damages from waves, as small a length of the jetty as practicable shall be under construction at any one time."

The specifications also provided that such boats, labor and material as might be required from time to time to aid the employees of the United States in inspecting, in making surveys, or in other matters connected with the work should be furnished for the time by the contractor at cost price (to be determined by the engineer officer in charge, and exclusive of contractor's charges for supervision, superintendence, etc.) whenever required by the United States agent in charge and should be paid for by the United States with the monthly payments. The amendment to the specifications included a provision that:

"Whenever the contractor furnishes board and lodging to his own employees, he shall also, if required by the Engineer Officer in charge, furnish suitable board and lodging to such employees of the United States as are connected with the work, all at reasonable rates satisfactory to the Engineer Officer in charge, to be paid for by the United States with the monthly payments."

Owing to the delay arising out of the publication of the amendments, the specifications, as amended, provided that "The placing of rock in the jetty shall begin within 90 calendar days from the date of the receipt by the contractor of his contract duly approved. The work shall be prosecuted vigorously and continuously with a suitable plant to insure its completion on or before January 31st, 1904." The

specifications contained a provision for extension of the time in case the work could not be completed by the time originally set, in the following words:

"Provided, however, that the party of the first part may, with the prior sanction of the Chief of Engineers, waive for a reasonable period the time limit originally set for completion and remit the charges for expenses of superintendence and inspection for so much time as in the judgment of the said Engineer Officer in charge may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, *or other unforeseeable cause of delay arising through no fault of the contractor*, and which prevented him from commencing or completing the work of delivering the materials within the period required by the contract." (*Italic ours.*)

The date of the contract was April 6th, 1903, and it was approved by the Chief of Engineers on April 20th. It does not appear on what date the claimant received "his contract duly approved," but, after a delay of 30 days due to the grounding of his tug, claimant began his active operations on August 18th, 1903, and completed his work on September 17th, 1904. In all he constructed 2100 feet of the jetty from the outer end, or Station F, shoreward. (Finding VI, Rec. p. 23.)

The adoption, though merely tentative, of the Haupt design for the jetty in question, when under consideration by Congress, had been strongly opposed by the Corps of Engineers; and the claimant had scarcely entered upon the fulfillment of his contract before the Government representative in charge began to impede and embarrass him by his constructions of the specifications and by arbitrary exercise of his authority—

the most serious and unlawful of which obstructions was the denial to claimant of permission to lay the crest blocks when the work was manifestly ready to receive them. In the performance of the work, it was advantageous to claimant to have his plant and employees operate on the lee side of the structure where they would be protected from the action of the rough seas, and, for this purpose, it was desirable that he be allowed to impose the crest blocks on the top of the core as rapidly as possible, so that the waves could not pass over it and interfere with the workmen and thus delay the completion of the contract. When claimant had completed from 100 to 200 feet of the core, he requested from the inspector in charge permission to begin to lay the crest blocks. This permission was refused on the ground that the core "had not consolidated." In October, 1903, claimant had built up 300 feet of the core to the required elevation and was allowed to lay some of the side or slope stones which broke the action of the waves to some extent but not so much as the crest blocks would have done, because they stopped considerably below the top plane of the crest. It was unavoidable that some time would be lost anyhow because of bad weather and rough seas, but, if claimant had had the protection of the crest blocks, he would have been able to work a great deal of the time which otherwise he would lose. Claimant continued to request permission to impose the crest blocks but the inspector refused and continued to refuse this permission until May, 1904, (*long after the date set for the completion of the entire work*) at which time between 1400 and 1500 feet of core had been repaired and completed. The inspector always alleged as a reason for his refusal that the jetty had not had sufficient time to consolidate and no other reason was ever given for his refusal of the permission. If the claimant had been permitted to commence the laying of

the crest blocks in October, 1903, when it was manifest that the core had fully settled and consolidated, he would have had such additional protection to his plant and workmen as would have enabled him to work 60 days more than he did between that time and May 7th, 1904, the date when the first crest blocks were laid. (Finding VII, Rec. p. 25.) As a matter of fact, the number of days worked subsequent to the 30th day of April, 1904, was only 58. The total number of days of actual work was 131, while the elapsed time from the beginning to the completion of said work was 392. The running cost of the work, (exclusive of the fixed charges) was \$63,780.00, which, distributed over the 392 days made an average daily cost of \$162.70. (Finding XVII, Rec. p. 28.)

After the claimant was permitted to proceed with the laying of the crest blocks, the agent of the United States rejected a great many of them because they did not conform strictly to his theory of the measurements laid down in the specifications, and, while some of these stones were afterward accepted, a great many of them were used as large riprap and paid for as such at much lower prices, to claimant's damage in the sum of \$400.00. These rejections, which compelled claimant to furnish other crest blocks in their place, delayed the completion of the work 10 days. After demonstrating that it was impossible to obtain the stones to meet the specifications as they were being construed in the measurements of the engineer officers, the claimant was given a so called "supplemental" contract by the engineer officers, providing that "any large block would be accepted that was as valuable or more valuable to the United States and would make the work as stable or more stable than if the dimensions conformed strictly to the letter of the specifications"—in contemplation of which blocks similar to those previously rejected were accepted, and the

engineers compelled claimant to take ten cents per ton less. The stones which claimant was furnishing were as serviceable for the work as they would have been had they conformed strictly to the specifications by the engineer's scheme of measurement. Their fitness depended upon their weight, size and capacity for giving a finished appearance to the work. The claimant contends that the "supplemental" agreement expressed simply what was intended by the original agreement, which was itself controlled by the Aransas Pass Harbor Company's specifications. This, evidently, was the view taken by the Court of Claims when it awarded judgment to claimant on Finding VI.

Claimant in order to do this work had to keep a large force of men under employment all the time, paying them \$40.00 per month and boarding them at a cost of \$20.00 per month, so that the average nominal cost to him was \$60.00 per man per month or \$2.00 per day. However, as he was able to work an average of only one-third of the time, the cost of this labor to him was really \$6.00 per day. Under his contract with the Government, he was required to furnish to the engineer officer at actual cost (to be determined by the engineer officer) labor whenever required. He did furnish 140 days of such labor and payments to him were made at the rate of but \$2.00 per day. (Finding XII, Rec. p. 27.) The Court of Claims allowed nothing on this item.

Claimant also boarded some of the employees of the United States at an expense of \$20.00 per month, but the engineer officer paid him for this board at the rate of only \$15.00 per month per man. (Finding XI, Rec. pp. 26-27.) The Court of Claims allowed nothing on this item.

Another delay of 30 days in the completion of the work was caused by an epidemic of yellow fever which resulted in an establishment of a quarantine of some two weeks' duration. It caused a disorganization of claimant's own labor

forces, of the labor force at the quarry from which he was obtaining his stone and of the transportation facilities in the vicinity. (Finding XIII, Rec. p. 27.)

When January 31st, 1904, arrived and claimant had not completed his contract, the engineer officers proceeded to assess against him the cost to the Government of the superintendence and inspection of the work thereafter, except that they did allow him a credit of one-half of the month of February, the equivalent of the actual duration of the proclaimed quarantine. (Finding XIII, Rec. p. 27.) The inspection charges assessed against claimant amounted to a total of \$2,468.00. (Finding XVI, Rec. p. 28.)

The claimant was obliged to give the job his personal attention and the value of his time was \$750.00 per month. (Finding XVIII, Rec. p. 28.)

This court has held (see *United States v. Smith*, 94 U. S., 218) that the Court of Claims need not itemize its judgments, but following the conclusion of law it is evident that the judgment in this case is made up about as follows:

10 days lost time (Finding VI) at \$162.70 per day (Finding XVII) -----	\$1,627.00
Difference in price of large blocks (Finding VI) -----	400.00
60 days lost time (Finding VII) at \$162.70 (Finding XVII) -----	9,762.00
Value of Claimant's time (Findings VI, VII and XVIII) -----	1,750.00
Reimbursement of inspection charges (Findings XIII, XIV, XV and XVI) -----	1,193.05
	<hr/>
	\$14,732.05

We do not pretend to say that the foregoing calculation is exact, but it is as nearly so as it can be figured. However, as this court will take these findings and enter the judgment in its opinion due, the matter is not particularly material.

### **SPECIFICATION OF ERRORS.**

The claimant assigns the following errors of the Court of Claims:

*First.* In not entering a judgment in claimant's favor for all the time he was delayed by the arbitrary and unlawful acts of the agents of the United States at the *per diem* cost to claimant of \$162.70 per day for each and every day.

*Second.* In not entering judgment in claimant's favor for the value of his own time during all of the delay caused by the arbitrary and unlawful acts of the agents of the United States.

*Third.* In not entering judgment in favor of the claimant for all the inspection charges assessed upon him by reason of all delays not the fault of the claimant.

*Fourth.* In not entering judgment for the claimant for the difference between the amount paid him by the agents of the United States for labor furnished to them and the actual cost of such labor to the claimant.

*Fifth.* In not entering judgment in favor of claimant for the difference between the amounts paid to the claimant for board furnished the agents of the United States and the actual cost of such board to the claimant himself.

### BRIEF OF ARGUMENT.

What this claimant undertook to do by his contract with the engineer officers of the Government was to build the jetty at Aransas Pass under their honest supervision. The provision in the specifications, which were made a part of the contract, to the effect that the judgment of the engineer officer should be final, was necessary to secure to the Government the proper authority for, and a method of, enforcing performance of the contractor's obligation; this provision was not exceptional, but, as this court is aware, may be found in all the engineering contracts of the Government. It does not mean, and has never been construed by any court to mean, that the contractor places himself irremediably at the mercy of the caprice, prejudice or arbitrary will of the engineer. The rule, as stated in *Kihlberg v. The United States*, 97th U. S., p. 402, is:

"In the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his [the engineer's, here] action in the premises is conclusive upon the appellant as well as upon the Government."

This same rule is stated in a little different language in *United States v. Barlow*, 184 U. S., p. 123, where it is said:

"The decision of the engineer in charge of the work  
\* \* \* was final when properly exercised."

Again in *Martinsburg, etc., R. R. Co. v. March*, 114 U. S., p. 555, the court said:

"The estimate of the engineer, upon the basis of the contract price, was conclusive, unless impeached on the ground of fraud, or such gross mistake as necessarily implied bad faith."

The rule above quoted is followed in *Bowe v. The United States*, 42d Fed., p. 761, *Fletcher v. Railroad Company*, 19th Fed., p. 731, and in other cases too numerous to mention.

The corollary of this rule is that where the judgment or discretion has been exercised fraudulently or in bad faith, or where such gross errors as imply fraud have been made against the other party to the contract, he may recover such damages as he has suffered by reason of the "improper interference" with his work. In short, this claimant was entitled to the benefit of the honest judgment of the engineer in charge over him, and, if he did not get that honest judgment, he is entitled to recover his damages. The petition charges that the agents of the United States did not act in good faith in respect of their requirements of the claimant and the Court of Claims has so found.

This court will perceive that, with the exception of two matters of minor importance to which we will hereafter briefly refer, the main complaint involved in this appeal is the erroneous application of Finding VII to the judgment. The Court of Claims in Finding VII has found that as early as October, 1903, claimant was endeavoring to obtain permission to lay the crest blocks on the core of which "it was *manifest* that large parts \* \* \* had fully settled and consolidated." "Manifest," according to all the dictionaries, means "clear," "plain," "evident to the eye and understanding." So that if it was "manifest" that the core had fully settled and consolidated, it naturally follows that this was known to the inspector and that the denial of the permission to lay the crest blocks (which the claimant had the right to do upon the consolidation of the core) was such a fraud as entitles him to recover the damages he has thereby suffered. The claimant's right to recover could not be more complete had the Court of Claims found in so many words that the decisions of the Government's officer were grossly

fraudulent and made in bad faith. Apparently the Court of Claims, with delicate consideration for the feelings of the engineer department, chose to employ different, though just as effective, language. But for the denial of this permission to lay these crest blocks, they would have been laid and thus substantially all of the delay in the completion of the contract would have been avoided.

The fact that the contract was due to be completed by January 31st and that the claimant was not permitted to proceed with a necessary intermediate stage of the work until May 7th, suggests an inquiry if there was not fraud upon his rights, and this inquiry is affirmatively answered when it is found that he was ready, able and anxious to proceed with this intermediate work, and that it was manifest that the structure was in a condition for him to do so. It becomes doubly conclusive when it is seen that, while upon no possible theory could the delay be attributed to him, he is yet mulcted to the full extent of the inspection charges. If the judgment of the Government's officer had been exercised in good faith—that is, if he had really believed that the core had not sufficiently consolidated—it is impossible to conceive a theory of good faith by which the claimant should have been charged with the expenses of the inspection during the resulting delay. Moreover, despite the provision in paragraph 60 of the specifications that “where the uncompleted structure is liable to serious damages from waves, as small a length of the jetty as practicable shall be under construction at any one time,” the claimant was compelled to build and maintain nearly, or quite, *two-thirds* of the *entire* 2100 feet of core constructed by him, and for many months, pending the permission to lay the crest blocks, was compelled to leave it unprotected to the violence of the elements. So, we say again, that Finding VII is not merely equivalent to a finding of fraud, but is a plain finding of

fraud expressed in the court's own terms. Upon that conclusion the court rendered a judgment in claimant's favor.

### First Error Assigned.

It is the utter and inexplicable inconsistency of the judgment of the Court of Claims with its Findings VII and XVII which makes this appeal necessary. What the claimant is entitled to recover for is not merely the 60 substituted working days. He is entitled to recover for each and every day of actual delay forced upon him by the unlawful denial of the permission to lay the crest blocks (Finding VII) at the per diem cost of such delay to him—\$162.70 (Finding XVII). It is respectfully insisted that this delay was exactly 145 days. If the claimant would have done 60 days more work *before* May 7th, but only 58 days work were required after April 30th, necessarily he would have finished not only *by*, but *some days before* April 30th; and, as Finding XVII shows that he was able to work an average of only one day in three throughout the whole period of the contract (including the more rapid work after he was allowed to lay the crest blocks), the Government certainly cannot complain if the same ratio be employed, for the purpose of this calculation, in determining a definite date, prior to April 30th—which would carry the date of completion back to at least as early as April 25th; and from April 25th to September 17th is 145 days. Though Finding VII accurately shows the loss to claimant of these 145 days at an average expense of \$162.70 for each day, the Court of Claims completely ignored all but the mere 60 working days which the claimant had to make up at a later time. The judgment of the Court of Claims on this item instead of being for \$9762.00 should have been for

\$23,591.50, representing the actual delay to the claimant resulting from the unlawful denial of the permission to lay the crest blocks.

### **Second Error Assigned.**

This assignment has to do with the amount properly due to the claimant as compensation for his own time, which the court by Finding XVIII has valued at \$750.00 per month. The Court of Claims apparently has allowed judgment to claimant for the two and one-third months represented by the ten days delay referred to in Finding VI and the 60 lost working days referred to in Finding VII. The amount thus due to the claimant is, of course, determined by the time he was unlawfully delayed by the agents of the Government, and, besides all the time after April 25th, (as we have demonstrated in our discussion of the first assignment of error) includes those additional 10 days of delay caused by the unlawful rejection of the crest blocks (Finding VI), which carries the time back to April 15th. The claimant, therefore, should be compensated for five months and two days, and the amount should be \$3800.00, instead of \$1750.00, allowed him by the Court of Claims.

### **Third Error Assigned.**

This assignment has to do with the amount properly reimbursable to the claimant as remission of the inspection charges. The Court of Claims, though recognizing the correctness of the proposition that the claimant should recover the inspection charges, has, as to the quantum of recovery, made the same mistake as in its judgment with respect to the reimbursement for claimant's time and expenses. The court has allowed the claimant only the balance of the

February inspection charges (Finding XIII), the \$320.00 covered by Finding XIV and two and one-third times the average monthly charges as shown by Finding XVI.

Under the specifications the claimant was entitled to be free of all expense of inspection during delays not occasioned by any fault of his, (Rec. pp. 3, 22) and the true method of determining the judgment on this item is to ascertain when, but for such delays, he would have finished, then charge him with the inspection expenses between January 31st and that date. As we have shown above, but for the delays unlawfully occasioned by the Government's agents, the claimant would have finished the work by April 15th. However, the progress of the work was delayed 60 days more by the epidemic of yellow fever (Finding XIII) and by the accident to the claimant's tug (Finding XIV), neither of which, as the Court of Claims has found, was the claimant's fault. It is obvious, therefore, that but for the combination of all these delays, none of which was the fault of the claimant, he would have finished the work by the 15th of February, 1904. Consequently, the most with which he could be charged is one-half month's expense, which, at the average rate of \$323.45 a month, would be \$161.72. The total of all these expenses which have been denominated inspection charges is \$2,468.00. This amount includes some extra expenses incurred by the Government in inspecting the crest blocks which were being rejected unlawfully; but, if the claimant is entitled to a judgment on Finding VI, he is entitled to a judgment on Finding XV. In any event, these items were a part of the inspection charges, all of which the claimant is entitled to recover except \$161.72. The judgment on this item, therefore, should be for \$2,306.32.

#### Fourth Error Assigned.

This assignment relates to the difference between the prices paid to the claimant (\$2.00 per day) for the labor furnished by him to the Government engineers and the actual cost (\$6.00 per day) of such labor to the claimant himself, covered by Finding XII; and though the finding shows just what the cost was, that is disregarded in the judgment. The Court of Claims, after determining the actual cost to the claimant of this labor as \$6.00 per day, found that the "United States engineer officer in charge in determining the cost price of said labor for the purpose of reimbursing claimant, allowed and paid him \$2.00 per day for labor actually performed, which was the prevailing rate at that place for day labor." The court does not, in this finding, intimate that the underpayment was the result of any fraudulent underestimate by the engineer officer, and, doubtless, for that reason denied a judgment on this item of the claim. In view of the general conduct of the engineer officers toward the claimant, as disclosed by these findings, it is difficult to acquit them of a deliberate intention to defraud the claimant even in this minor matter, notwithstanding the failure of the Court of Claims to find any fraud. But we are not concerned with any motives of the engineer officers in this matter. This is a case not of misuse of, but of failure to use, the discretion with which the Government representative was vested. The engineer, in other words, abrogated the function which the contract gave him and did something that he had no color of authority to do. His duty was to determine and allow to the claimant the cost to him (claimant) of the labor he was required to furnish for the Government's uses. He in fact allowed the theoretical cost of doing the same work by employing labor by the day—wrongly assuming too that

the workmen could be found at that point for a day's work when the weather chanced to be favorable.

If the engineer had professed to allow the claimant the actual cost of his labor, claimant would be helpless unless he could convict the engineer of bad faith. There was no such profession, however. The engineer inquired of nothing but the cost of labor employed and paid by the single day, and allowed this only to claimant. It is respectfully insisted that the claimant should have judgment for the 140 days' labor at an additional \$4.00 per day, or \$560.00.

#### **Fifth Error Assigned.**

This assignment has to do with the difference between amounts paid to claimant for the board of employees of the United States and the actual cost of such board to claimant himself. The specifications on this subject are very much the same as on the question of labor to be furnished; and what we have said there applies here; there is no substantial difference between the two questions. The Government paid the claimant \$261.50 for board furnished by him to its employees, at the rate of \$15.00 per month, which, as the court finds, "was the usual and customary price paid by the United States for the board and lodging of its employees at other points in Texas," while as the court also finds, "claimant's actual outlay for the board of his employees was about \$20.00 per month." It does not appear that the cost to claimant for the board of the employees of the United States could have been less than the cost of the board of his own employees. The claimant should be allowed \$5.00 per month additional on this item, being one-third of the \$261.50 paid him; or \$87.16.

### RECAPITULATION.

The judgment of the Court of Claims should have been made up as below:

Delay by reason of unlawful rejection of crest blocks (Findings VI and XVII), 10 days at \$162.70 -----	\$1,627.00
Difference in prices paid for stone unlawfully rejected (Finding VI) -----	400.00
Delay by reason of unlawful refusal of permission to lay crest blocks, 145 days, at \$162.70 (Findings VII and XVII) -----	23,591.50
Value of claimant's time for five months and two days, at \$750.00 per month (Finding XVIII) -----	3,800.00
Remission of inspection charges (Findings XIII, XIV, XV and XVI) -----	2,302.32
Difference in cost of labor (Finding XII) -----	560.00
Difference in cost of board (Finding XI) -----	87.16
	<hr/>
	\$32,371.98

We have confined our assignments of error to the fewest possible number, eliminating all questions about which there could well be any argument. While the findings are not entirely satisfactory to claimant, they must be presumed to contain all that the Court of Claims deemed material to the case. If, in the counsels of the Court of Claims, there had been any reason for denying to claimant the judgment we assert to be due him, that court has given no hint of it in the findings. These findings present a tale of great wrong and hardship inflicted upon this claimant. Taken in connection with the two small delays indicated by Findings IX and X, they show that the claimant, but for the *unlawful* delays forced upon him by the agents of the Government, would have completed his contract not only within the time

as automatically extended by the fever epidemic and the grounding of the tug, but within the time set by the contract. One of the other small delays (Finding X) was plainly the fault of the Government, due we might concede, to an honest mistake of judgment; while the other (Finding IX) was caused by different constructions of a clause in the specifications which reasonable men might read in different lights. They are comparatively trivial and because they are not of the same impelling character we prefer to ask no more than that the judgment shall be made consistent with the findings we have discussed; and we invite the closest scrutiny of our analysis of what the judgment should be.

### **Defendant's Appeal.**

After claimant had taken an appeal, the defendants prayed their cross-appeal. Assuming that their position here will be the same as it was in the Court of Claims, it will be contended that, though delays were caused by defendant's agents in authority over claimant, though there were charges for inspection during these delays, though claimant paid more for labor and board than the defendant allowed him, yet these and all other questions were to be determined by the defendant's agent as the final arbiter, and that unless fraud or gross error is shown, the claimant is without remedy. As to the largest items, that is precisely the ground we stand upon, and stood upon in the court below; so that, it must be demonstrated by defendant that the findings do not show that the engineer officer consciously denied the claimant his rights.

The case at bar presents no aspect to take it out of the general rule of law, governing contracts, that one party to the contract must not do anything to increase the burden or expense of the other's performance. The consequences,

to the claimant, of the refusal of the permission to lay the crest blocks when "it was manifest" that the core was in condition to receive them, were self-evident to the engineer. Aside from the language of Finding VII, every surrounding circumstance was such as to repel absolutely any idea of honestly mistaken judgment or the exercise of good faith on the part of the engineer. The findings speak for themselves. There is no need to go over the same ground again, and there is nothing to be added—except, perhaps, that if "it was manifest" that the structure was ready to receive the crest blocks in October, 1903, then it must be equally manifest that the only reason given for refusing claimant permission to lay them was wholly false.

In conclusion, it may not be amiss to emphasize the fact that claimant's operations and progress in every respect were subject to the dictation of the engineer officer. He could determine what stone to accept or reject; nothing could be placed in the jetty except upon his express direction; in one way or another he could control the time and order of the work; he could determine what portion of the delay was not the fault of the claimant. The amount claimant might have for board and labor furnished was also subject to the engineer's determination. The exercise of such power should have been attended with the utmost circumspection and supported by a show of reason. The postulates for correct decisions in every case were so simple as to stare him out of countenance; yet, on absolutely every question entrusted to him, these findings show that the engineer officer, the agent of the United States, erred against claimant. The circumstance is of peculiar and persuasive significance as to the entire attitude and purposes of the Government's agents.

The claimant's right to judgment on the larger items of the claim, we repeat, is based on the fraud of defendant's

agents; while on the smaller items he is entitled to judgment because, in determining the matters presented, the engineer disregarded the contract and reached his conclusions by other means, as a result of which gross errors were committed against claimant.

The judgment, we submit, of the Court of Claims should be corrected and judgment entered here for \$32,371.98 as set out in the recapitulation.

Respectfully submitted,

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